No. 85-5542

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

ALVIN BERNARD FORD, or CONNIE FORD, individually, and as next friend on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE

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EDITOR'S NOTE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) respectfully moves, pursuant to Rule 36.3, for leave

to file the attached brief as amicus curiae in support of the petition for writ of certiorari.

1. Counsel for petitioner has consented to this filing, but counsel for respondent has refused to consent to it, necessitating this motion.

2. The NACDL is a nationwide nonprofit association of some 5,000 lawyers whose practice includes criminal defense. Its principal purpose is "to achieve justice and dignity for defense lawyers, defendants and the criminal justice system itself."

3. Since Gregg v. Georgia, 428 U.S. 153 (1976), the NACDL has actively encouraged its members to undertake the difficult work of representing defendants in capital cases. Through its publications and its adjunct, the National

Criminal Defense College, the NACDL has also endeavored to train defense lawyers for this task.

4. NACDL members currently represent capital defendants in virtually every state which has an active death penalty, including Florida.

5. Through the commitment of the NACDL and its members to the representation of defendants in capital cases, NACDL members have attempted to shoulder the heavy burden of the bar to provide effective representation for persons already condemned to death, as well as for persons being tried in capital trials. Because NACDL members' commitment to representation has extended to state and federal collateral proceedings, NACDL members have experienced first-hand the inability to provide effective representation to clients who have become

incompetent before execution in states like Florida, where there is no adversarial procedure for the determination of competency at the time of execution. Without access to a procedure for the determination of competency that allows the advocacy and adversarial debate required for accurate factfinding, post-conviction counsel have not been able to fulfill their professional and ethical obligation to protect the interests of their incompetent clients.

6. The NACDL has long been concerned with removing barriers to the effective representation of criminal defendants. Because of its view that the criminal justice system functions justly only if there is effective advocacy on behalf of defendants, the NACDL requests the opportunity to address the need for removing the barriers to effective

advocacy on behalf of the incompetent whose incompetency entitles them to be spared from execution.

ACCORDINGLY, because of the NACDL's overriding concern for the effective representation of criminal defendants, and for the system of justice that depends for its integrity upon effective advocacy, the NACDL respectfully requests that it be heard through its attached brief in support of the petition for writ of certiorari.

Respectfuly submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is stated in the foregoing motion.

SUMMARY OF ARGUMENT

The right of the condemned to be spared from execution when incompetent is a right of fundamental importance -- to the condemned prisoner and to the public. Whether this right is based in the Eighth Amendment or in state law, the Due Process Clause guarantees that rights of this stature be protected by consistent and reliable factfinding procedures. Florida, however, provides none of the procedures which are necessary to reduce the risk of erroneous factfinding. The Florida governor determines the competency of the condemned exclusively on the basis of the written reports of three psychiatrists whom he appoints to evaluate the prisoner. Neither the

prisoner nor counsel for the prisoner can present opposing expert opinion, challenge the appointed psychiatrists' opinions, or submit argument on behalf of the prisoner. Twenty other states provide a procedure similar to Florida's for the determination of competency at the time of execution. Notwithstanding the relatively infrequent assertion of the right to be spared from execution when incompetent, the Constitutional significance of the right and the wholly arbitrary way in which it is enforced will cause the questions presented on behalf of Mr. Ford to arise in other cases until the Court intervenes to settle these questions. Certiorari should thus be granted.

ARGUMENT IN SUPPORT OF CERTIORARI

The right of the condemned to be spared from execution when incompetent is a right so basic to our collective concept of human dignity that it must be counted as among the fundamental rights of our citizens. From its inception the Constitution has mandated that rights of this stature be safeguarded by consistent and reliable factfinding procedures. Until now, however, the Court has not been presented with a case which required that it consider both the nature of the right to be spared from execution and the adequacy of the procedures utilized by the states to protect this right.

Review should be granted to consider these questions in Mr. Ford's case. Without such review, the right to be spared from execution when incompetent will be a right without any protection

in the State of Florida and as many as twenty other states. Further, without review, the questions presented by counsel for Mr. Ford will continue to arise in other cases as executions occur in increasing numbers in more states.

A. The right of the condemned to be spared from execution when incompetent is a fundamental right based in the concept of human dignity

For nearly a millenium, the common law has flatly prohibited execution of the incompetent.[1] The prohibition of the common law was carried forward in the formative years of this country, see,

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1 See 2 J. Stephen, A History of the Criminal Law of England 151 (1883) (tracing this prohibition back at least to the thirteenth century); FitzHerbert, Natura Brevium 202 (1534) (quoted in Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1931-32)); E. Coke, Third Institute 6 (1644); 1 M. Hale, The History of the Pleas of the Crown 35 (1736); 4 W. Blackstone, Commentaries on the Laws of England 24-25 (1768); Royal Commission on Capital Punishment, 1949-1953 Report 98 (1953).

e.g., 1 J. Chitty, A Practical Treatise on the Criminal Law 620 (Amer. Ed. 1819); F. Wharton, A Treatise on the Criminal Law of the United States 50 (2d Ed. 1852), and is still today adhered to with unanimity by the states which permit capital punishment. See Appendix (attached hereto).

The history of the prohibition against executing the incompetent is testimony both to its fundamental importance and to its status as a fundamental right. Its importance to the public derives from long-agreed-upon definitions of human dignity and morality: the execution of the incompetent has been prohibited for the very reason that it is "savage and inhumane," Blackstone at 24, "a miserable spectacle of extreme inhumanity and cruelty," Coke at 6, and "repugnant to the moral traditions of

Western civilization," Royal Commission on Capital Punishment at 98. From the perspective of the condemned, to have his life taken when he is unable to understand what is happening, to defend against his conviction and sentence as the law might still allow, or even to prepare for death, is a nightmarish prospect -- the reality of which has always informed the ancient rejection of execution of the insane.

Further, the unbroken and absolute mandate of the common law prohibition demonstrates that the condemned has a right -- not just a "mere hope," cf. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1, 10-11 (1979) -- to be spared from execution if incompetent. Historically and in present-day statutes, upon a demonstration of incompetency, a stay of execution

was and is mandatory. See, e.g., Blackstone at 394-97; Fla. Stat. § 922.07 (1), (3) (1983). Because there is a "set of facts which, if shown, mandate[s] a decision favorable to the [condemned]," Greenholtz, 442 U.S. at 10, the interest of the condemned in being spared from execution is not only a matter of fundamental human importance but also a matter of legal right.

B. Although the right to be spared from execution when incompetent must be protected by consistent and reliable factfinding procedures, it is not so protected in Florida and many other jurisdictions, and it will not be unless the Court intervenes

Whether it is held to be an Eighth Amendment right or a state-created right, see Mr. Ford's Petition for Writ of Certiorari, the right to be spared from execution when incompetent is a right that must be protected by consistent and

reliable factfinding procedures. The Due Process Clause guarantees this degree of protection.

As counsel for Mr. Ford have demonstrated in the petition, the degree of protection required by the Due Process Clause for a particular right is the result of a balancing process which takes into account the private interest, the public interest, and the likelihood that procedural safeguards will reduce the risk of erroneous decisions. When the right to be spared from execution when incompetent is examined in this context, the private and public interest in accurate determinations of competency is paramount. Thus, procedures that decrease the risk of erroneous decision-making are mandated.

Florida, however, provides no such procedures. As Mr. Ford's petition has shown, Florida utilizes a non-adversarial "process" of determining competency in which the governor decides, solely on the basis of three appointed psychiatrists' written evaluations, whether the condemned is competent. This process does not permit the condemned to present opposing psychiatric or lay opinion, to challenge the opinion of the governor's appointed psychiatrists or the adequacy of their evaluation procedures, or even to advocate by counsel a position that differs from the opinion of the appointed psychiatrists. In short, Florida's process excludes altogether the "adversarial debate our system recognizes as essential to the truth seeking function," Gardner v. Florida, 430 U.S. 349, 359 (1977) -- a debate which is a pre-

requisite to the "most accurate determination of the truth on the issue [of competency]," Ake v. Oklahoma, ___ U.S. ___, 105 S.Ct. 1087, 1096 (1985), "because there often is no single, accurate psychiatric conclusion on legal [competency] in a given case," id. In twenty other states, the process of determining the competency of the condemned is also -- like Florida's -- non-adversarial and within the executive branch.[2]

Accordingly, without the intervention of the Court, condemned people who may very well be incompetent will be executed in the majority of states that

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[2] See the statutes and cases cited in the Appendix for Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Indiana, Kansas, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Mexico, Oklahoma, Rhode Island, South Carolina, Virginia, and Washington.

permit capital punishment without consistent, reliable determinations of their competency having first been made.

C. The questions presented in Mr. Ford's case will continue to arise until the Court settles these questions

The right of the condemned to be spared from execution when incompetent is not frequently asserted.[3] However, as infrequent as the assertion of the right may be, two facts remain: a small number of people on death row will become incompetent before they are executed, see, e.g., R. Johnson, Condemned to Die: Under Sentence of Death (1981), and most of these people will not have their competency reliably determined -- despite

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3 In the nearly seven-year tenure of Governor Graham in Florida, during which 116 death warrants have been signed, the right has been asserted on only four occasions: in the cases of Arthur Goode, Mr. Ford, Carl Jackson, and Gary Alvord.

the mandate of the Constitution -- unless the Court intervenes. Moreover, as executions begin to occur in more jurisdictions, the number of people nationally who assert the right to be spared from execution because of incompetency will increase. Accordingly, the questions presented in Mr. Ford's petition will continue to arise until the Court settles these questions.

The Court's consideration of certiorari in Mr. Ford's case should be governed by these realities, not by speculation over the specter of "floodgates" that may be opened if certiorari is granted.[4] Certiorari should thus be

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[4] Throughout the proceedings below, the State of Florida has argued that if Mr. Ford's claim is valid, the floodgates will open to frivolous assertions of incompetency at the time of execution. The same specter has been raised for centuries, but it has consistently been rejected because of the courts' capacity to deal with the "differences between pretenses and realities." Hawles, Remarks on the Trial of Mr. Charles

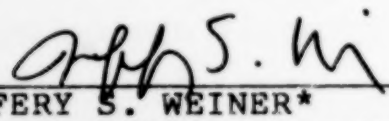
granted to make clear to all the states the right of the condemned to a reliable determination of competency if his competency is drawn into question prior to execution.

CONCLUSION

For these reasons, as well as those set forth by counsel for Mr. Ford, the National Association of Criminal Defense Lawyers urges the Court to grant certiorari in Mr. Ford's case.

Bateman, 11 State Trials 474, 478 (1816). Further, during the time that Mr. Ford's case has had high visibility -- between May 30, 1984 when his execution was stayed and the present -- the claim of incompetency at execution has been raised in only two of the thirty-six cases in which the Florida governor has signed death warrants. If there were any floodgates to open, Ford has provided a substantial opportunity for them to open, and they have not. Thus, the fear of a flood of frivolous claims should be given no more credence now than it has ever been given.

Respectfuly submitted,



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A P P E N D I X

EXECUTION OF THE INCOMPETENT:

A National Survey of State Policies

1. Explicit statutory proscription against execution of incompetent:

ALABAMA	Code (1981) §15-16-23
ARIZONA	Rev. Stat.Ann. (1982) §13.4021 et seq.
ARKANSAS	Stat. Ann. (1977) §43.2622
CALIFORNIA ...	Penal Code (1979) §3700 et seq.
CONNECTICUT ..	Gen. Stat. (1980) §54-101
FLORIDA	Statutes (1983) §922.07
GEORGIA	Code Ann. (1982) §17-10-60 et seq.
ILLINOIS	Rev. Stat. (1982) Ch. 38, §1005-2-3
KANSAS	Stat. (Supp. 1981) §22-4006
MARYLAND	Ann. Code (1983 Cum.Supp.) Art. 27, §75
MASSACHUSETTS	Gen. Laws Ann. (1984 Supp.) Ch. 279 §62

MISSISSIPPI ..	Code Ann. (1983 Supp.) §99-19-57
MISSOURI	Rev. Stat. (1983 Supp.) §552.060
MONTANA	Code Ann. (1983) §46-19-201 et seq.
NEBRASKA	Rev. Stat. (1979) §29.2537 et seq.
NEVADA	Rev. Stat. (1983) §176.425 et seq.
NEW MEXICO ...	Stat. Ann. (1978) §31-14-4 et seq.
NEW YORK	Correc. Law (1983 Supp.) §655 et seq.
OHIO	Rev.Code Ann. (1982 Supp.) §2949.28 et seq.
OKLAHOMA	Stat.Ann. (1983) Title 22, §1004 et seq.
UTAH	Code Ann. (1982) §77-19-13
WYOMING	Stat. §7-13-901 et seq. (1984 Cum. Supp.)

2. Judicial adoption of common law rule proscribing execution of the incompetent:

LOUISIANA .... State v. Allen, 204 La. 513, 515, 15 So.2d 870-71 (1943)

PENNSYLVANIA .Commonwealth v. Moon, 383 Pa. 18 117 A.2d 96 (1955)

TENNESSEE .... Jordan v. State, 124 Tenn. 81, 135 S.W. 327, 329-30 (1910)

WASHINGTON ... State v. Davis, 6 Wash. 2d 696, 108 P.2d 641, 651 (1940)(dictum)

3. General statutory procedures requiring transfer of incompetent prisoners to state mental hospital:

DELAWARE ..... Code Ann. (1982) §11-406

INDIANA ..... Code Ann. (1983) §11-10-4-1 et seq.

NORTH CAROLINA Gen.Stat. (1983) §15A-1001

SOUTH CAROLINA Code Ann. §44-23-210 et seq. (1983 Supp.)

VIRGINIA ..... Code (1983) §19.2.177

NOTE:

-- Nine states (Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota North Dakota, West Virginia, Wisconsin) have no death penalty

-- Three states (Idaho, New Hampshire, Rhode Island) have a death penalty, but no case law or statute relating to execution of insane prisoners.

-- Four states (Colorado, Kentucky, New Jersey, and Texas) have recently repealed appicable provisions, leaving case law which supports the common law proscription of execution of insane prisoners. See Bulger v. People, 61 Colo. 187, 156 P. 800 (1916); Barrett v. Commonwealth, 202 Ky. 153, 259 S.W. 25 (1923); In re Lang, 77 N.J.L., 207, 71 A.47 (1908); Ex parte Morris, 96 Tex. Cr. R. 256, 257 S.W. 844 (1924).

-- Three states (Oregon, South Dakota, Vermont) were undetermined.

SUMMARY: OVERALL CATEGORIES

Explicit statutory proscription	22
Judicial adoption of common law	4
Statutory procedure applying to "any" prisoner	5
No case law or statute (but yes a death penalty)	3
Repealed statutes, leaving common law	4
No death penalty	9
Undetermined	3
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METHOD OF STUDY: This survey includes an examination of statutory and case law in each of the fifty states from 1895-present.